86-117

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RAJINDER SINGH SACHDEV,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether Congress has barred visa revocation from taking effect when notice thereof has not been served as Congress prescribed.

2. Whether petitioner was deprived of substantive due process when his deportability for lack of a valid visa was not assessed in terms of whether the revocation of his visa was statutorily barred from taking effect.

3. Whether the strict construction rule for interpreting restrictive immigration statutes can be waived when the restriction is against the government.

4. Whether the Courts can "estopp" the government by enforcing the sanctions which Congress has imposed for governmental failure to follow the law.

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IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Rajinder Singh Sachdev prays that a Writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on April 22, 1986.

Opinion Below

The opinion below is reported as *Sachdev* v. *INS*, 788 F.2d 912 (2d Cir. 1986) in which the Court of Appeals held that Sachdev was properly found deportable for lack of a valid visa at entry. Specifically, deportability was upheld on three grounds.

First, the Court held that Sachdev's entry visa which was issued on the basis of his being unmarried became automatically revoked when he married during the period in between visa issuance and entry. Second, the Court held that the entry

visa was unquestionably invalid even though notice of the underlying revocation has not been served as Congress prescribed. Finally, the Court held that there was no affirmative misconduct and therefore the "estoppel" doctrine was inapplicable.

Jurisdiction

The judgment of the Court of Appeals was entered on April 22, 1976 and the jurisdiction of this Court is invoked under 28 USC § 1254(1).

Constitutional Provision Involved

AMENDMENT V

"No persons shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Statute Involved

The statute involved is § 205 of the Immigration and Nationality Act, 8 USC § 1155. This statute reads as follows:

> ". . . The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under Section 204. Such revocation shall be effective as of the date of approval of any such petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by Section 235 and 236 . . ."

Statement of The Case

This is a case in which this honorable Court is asked to review an opinion of the Court of Appeals for the Second Circuit which upheld a final order of deportation by the Board of Immigration Appeals.

The Facts

Rajinder Singh Sachdev, the petitioner herein, entered the United States on September 12, 1982 and was admitted as a lawful permanent resident. His father had filed a visa petition on Sachdev's behalf, and the Immigration and Naturalization Service ("INS") approved the petition on the ground that Sachdev was an unmarried son of a lawful permanent resident. Accordingly, Sachdev obtained a "second preference" visa status ("first preference" being reserved for unmarried children of American citizens), pursuant to Section 204 of the Immigration and Nationality Act of 1952, 8 USC § 1154.

On July 4, 1982, one week after submitting his visa application to the American Vice Consul at the American Embassy in India, Sachdev married. Without informing immigration officials of the change in his marital status, Sachdev entered the United States on September 12, 1982. On June 7, 1983, Sachdev filed a petition on behalf of his wife and newborn son, seeking their admission to the United States. The petition, which listed his date of marriage, alerted the INS officials to the fact that Sachdev had married before he entered the United States.

Accordingly, the INS commenced deportation proceedings against Sachdev on July 3, 1983, and an Immigration Judge found Sachdev deportable pursuant to 8 USC § 1251. The Board of Immigration Appeals affirmed the decision on March 7, 1985, and dismissed the appeal. On July 29, 1985, Sachdev petitioned the Court of Appeals for review of the BIA order, and said petition was denied on April 22, 1986.

Chronology of Proceedings Below

The foregoing statement of facts clearly reflects the various stages of this case and the time periods involved. Therefore, a separate chronology is unnecessary.

Reasons For Granting The Writ

The Writ should be granted pursuant to Supreme Court Rule 17 which, among other things, provides that the Court will review judgments of lower courts which have decided federal questions in a way which conflicts with applicable decisions of this Court.

In recent times, this Court has found it necessary to curb "judicial activism" in the immigration field by holding that, under our tripartite system of government, the judicial branch would be usurping congressional supremacy in immigration when restrictive immigration statutes are interpreted in such a way that the restrictive thrust is diluted. The opinion of the Court of Appeals, in interpreting § 1155 of 8 USC, is in conflict with the strict policy of this Court to maintain congressional supremacy in immigration matters.

Paradoxically, § 1155 grants absolute power to the executive branch to revoke visas but provides that such revocation shall have no effect when notice thereof is not served on the two parties involved in the visa status, namely, the visa-petitioner and the beneficiary of the vias-petition.

Should this honorable Court choose to enforce the no-effect provision, the fact that it favors the alien and not the government would perhaps send the clearest signal to the lower courts that congressional policy in immigration matters must be enforced regardless of its harshness.

I

Congress Has Barred Visa Revocation From Taking Effect When Notice Thereof Has Not Been Served As Congress Prescribed

Sachdev concedes that his visa was revoked when he married during the period in between visa issuance and entry. What he is contending is that the visa revocation did not take effect because, under 8 USC § 1155, Congress barred visa revocation from taking effect when notice of such revocation was not served as Congress prescribed.

Under the first part of 8 USC § 1155, Congress granted the Attorney General unlimited power to revoke the validity of visa petition approvals and, thus, to revoke the visa status based on the petition approval. See § 203(d) of the I&N Act [8 USC §1155(d)]. See also *Sachdev* v. *INS*, 788 F.2d 912, at 913 (2d Cir.1986). However, in the second part of § 1155, Congress prescribed certain conditions under which the visa revocation shall have no effect:

> ". . . In no case, however, shall such revocation have effect *unless* there is mailed to the *petitioner's* last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the *beneficiary* of the petition before such beneficiary commences his journey to the United States . . ." (Emphasis Supplied).

The two notices prescribed above were not served upon Sachdev and his father. Therefore, the otherwise valid visa revocation did not take effect, and INS was barred from deporting Sachdev for lack of a valid visa, said invalidity never having taken effect. This claim was pressed by Sachdev in his petition for review to the Court of Appeals. However, as will be shown below, the claim was side-stepped in the Court's opinion.

II

Petitioner Was Deprived Of Substantive Due Process When His Deportability For Lack of A Valid Visa Was Not Assessed In Terms of Whether The Revocation of His Visa Was Statutorily Barred From Taking Effect

This Court has consistently held that the loss of permanent resident status is a protectible liberty interest as to which the requirements of due process unequivocally apply. See e.g. *Chew* v. *Colding*, 344 U.S. 590 (1953); and *Landon* v. *Plasencia*, 459 U.S. 21 (1982). Therefore, due consideration must be given to any *material* claim seeking to overturn a finding of deportability against a permanent resident alien.

Petitioner sought to prevent the loss of his permanent resident status by claiming that, under 8 USC § 1155, the revocation of his visa did not take effect because notice of such revocation was not served on himself and his father as the statute requires. This claim was material and quite deserving of at least a *direct* rejection by the Court of Appeals. However, this claim was side-stepped by the Court of Appeals when it stated as follows:

> ". . . The substance of petitioner's claim is that the INS failed to abide by the notice requirements of 8 USC § 1155, which provides that the revocation of an approved visa petition has no effect "unless notice of the revocation is communicated through the Secretary of State to the *beneficiary* of the petition before such beneficiary commences his journey to the United States." Sachdev claims that because *he* did not receive notification in India concerning the revocation of his visa petition, the INS now is precluded by its own *regulations* from deporting him. We disagree . . .". (Emphasis Supplied).

In the foregoing, the Court of Appeals made it appear as if 8 USC § 1155 mandates only one notice to the beneficiary of

the visa-petition and not one to the visa-petitioner as well. Secondly, the Court made it appear as if petitioner was claiming that it was the regulations and not the statute itself which barred the revocation of his visa from taking effect. By so doing, the Court itself deprived petitioner of substantive due process. Such deprivation was particularly injurious because one of the purposes of the three Judge panel in the judicial review procedures of 8 USC § 1105(a) *et seq* was to give an alien a meaningful day in Court on the question of deportability.

III

The Strict Construction Rule For Interpreting Restrictive Immigration Statutes Cannot Be Waived When The Restriction is Against The Government

As its justification for interpreting 8 USC § 1155 in the way it did, the Court of Appeals cited the absence of judicial authority to the contrary and opined that to do otherwise ". . . would invite fraud by petitioners seeking similar status." Such an interpretation flies in the face of this Court's unconditional directive that, in order for congressional supremacy in immigration matters to remain sacred, the courts must strictly construe restrictive immigration statutes so as to effectuate the restrictive thrust reflected in their plain language. *INS* v. *Jong Ha Wang*, 450 US 139 (1982); and *INS* v. *Phinpathiya*, 464 US 183 (1984).

Clearly, the language of 8 USC § 1155 reflects a congressional intent to nullify the visa revocation authority of INS officials when they fail to follow the notice requirements of the statute. This intent of *Congress* cannot be subordinated to the well-meant intent of the *judicial* branch to prevent fraud; especially since there is a fraud statute in 8 USC § 1182(a)(19). The strict construction rule which our highest Court has ordered to be followed for protecting congressional supremacy in immigration matters must be followed by the lower courts.

Otherwise, the authority of our highest Court will be undermined. See generally *Hutto* v. *Davis*, 102 S.Ct. 703 (1982).

IV

The Courts Can Estopp the Government By Enforcing the Sanctions Which Congress Has Imposed for Governmental Failure to Follow the Law

The Court of Appeals held that the facts of the case did not demonstrate misconduct by governmental officials and therefore it was unnecessary to reach the question of the applicability of the Supreme Court's estoppel holding in *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984). Petitioner submits that, because Congress has prescribed a notice procedure and a penalty for its nonobservance, governmental misconduct inhered within the INS failure to serve the revocation notices on petitioner *and* his father. Therefore, the Court of Appeals should have reached the question of the applicability of the Supreme Court's holding in *Heckler* v. *Community Health Services*, *supra*.

In the instant case, the petitioner is claiming that the INS is estopped from deporting him for lack of a valid visa because the INS did not serve the notices prescribed by Congress in 8 USC § 1155. However, in asking for estoppel relief, he is not asking the Court to fashion a remedy of its own. A remedy already exists in 8 USC § 1155 which bars visa invalidity from taking effect when the notices are not served. Therefore, in "estopping" deportation for lack of a valid visa, a person in a § 1155 case does not have to meet the heavy burden imposed by *Heckler* v. *Community Health Services*, *supra*. This is because the statute itself has fashioned the very remedy which the alien seeks in respect of the government's failure to follow the law.

CONCLUSION

For all of the foregoing reasons, the Writ of Certiorari should issue and the judgment of the Court of Appeals be reversed to effectuate the congressional policy underlying the notice requirements in § 1155 of 8 USC.

Respectfully submitted,

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July 18, 1986

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1156—August Term, 1985

(Submitted April 17, 1986 Decided April 22, 1986)

Docket No. 85-4112

RAJINDER SINGH SACHDEV,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

KAUFMAN, TIMBERS and CARDAMONE,

Circuit Judges.

Sachdev petitions for review of a final deportation order of the Board of Immigration Appeals, holding

petitioner deportable because he was not in possession of a valid unexpired visa when he entered the United States.

Denied.

GUNNAR A. SIEVERT, New York, N.Y. (Leo E. Ypsilanti, P.C., *on the brief*), *for Petitioner.*

JORGE GUTTLEIN, Special Assistant United States Attorney (Rudolph W. Giuliani, United States Attorney for the Southern District of New York; Steven E. Obus, *on the brief*), *for Respondent.*

PER CURIAM:

Rajinder Singh Sachdev entered the United States on September 12, 1982. His father had filed a visa petition on Sachdev's behalf, and the Immigration and Naturalization Service ("INS") approved the petition on the ground that Sachdev was an unmarried son of a lawful permanent resident. Accordingly, Sachdev obtained a "second preference" visa status ("first preference" being reserved for unmarried children of American citizens), pursuant to section 204 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1154.

On July 4, 1982, one week after submitting his visa application to the American Vice Consul at the American Embassy in India, Sachdev married. Without informing

immigration officials of the change in his marital status, Sachdev entered the United States on September 12, 1982. On June 7, 1983, Sachdev filed a petition on behalf of his wife and newborn son, seeking their admission to the United States. The petition, which listed his date of marriage, alerted INS officials to the fact that Sachdev had married before he entered the United States. Accordingly, the INS commenced deportation proceedings against Sachdev on July 3, 1983, and an Immigration Judge found Sachdev deportable pursuant to 8 U.S.C. § 1251. The Board of Immigration Appeals affirmed the decision on March 7, 1985, and dismissed the appeal. Sachdev now petitions for review.

The substance of petitioner's claim is that the INS failed to abide by the notice requirements of 8 U.S.C. § 1155, which provides that the revocation of an approved visa petition has no effect "unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States."

Sachdev claims that because he did not receive notification in India concerning the revocation of his visa petition, the INS now is precluded by its own regulations from deporting him. We disagree. Here, petitioner married subsequent to the approval of his visa petition, which had been granted on the basis of his unmarried status. To forbid the INS from deporting such aliens, we believe, would invite fraud by petitioners seeking similar preference status.

Sachdev contested the propriety of his deportation at the hearing before the Immigration Judge. We agree with the finding of the Board of Immigration Appeals that this

proceeding provided Sachdev fair and adequate opportunity to rebut the Service's allegations that his visa was invalid. *See Matter of Alarcon*, 17 INS 574 (BIA 1980). We give great deference to the Board's reasonable interpretation of the notice requirements of section 205, particularly in view of the absence of contrary authority. *See INS* v. *Jong Ha Wang*, 450 U.S. 139, 144 (1982); *De Los Santos* v. *INS*, 690 F.2d 56, 60 (2d Cir. 1982).

Sachdev also argues that the Service should be estopped from deporting him because officials failed adequately to warn him that if he married before entering the United States the approval of his visa petition would be revoked. For support, petitioner cites our holding in *Corniel-Rodriguez* v. *INS*, 532 F.2d 301 (2d Cir. 1976), in which we held the INS could not deport an alien where American officials had failed to warn her that marriage before entering the country would nullify her visa preference status.

Here, as in *Corniel-Rodriguez*, the INS was required by regulation to warn an alien, "when appropriate, that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission." 22 C.F.R. § 42.122(d) (modified in 1965). When he submitted his visa application, however, Sachdev signed a United States Department of State Optional Form 237 ("Statement of Marriageable Age Applicant"), which clearly set forth such a warning. Although petitioner complains the written warning should have been verbally translated for him into his native language, Punjabi, consular officials were justified in relying on Sachdev's own assertions on another form ("Optional Form 230") that he could read and write English. Accordingly, no translation was required. We believe this case presents a fundamentally

different situation from the one in *Corniel-Rodriguez*, where the petitioner received neither oral nor written warning of the consequences of her marriage. 532 F.2d at 307 n.19.[1]

Accordingly, the petition for review is denied.

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1 Because the facts here do not demonstrate misconduct by government officials, we need not reach the question of the applicability of the Supreme Court's holding in *Community Health Services* v. *Heckler*, 467 U.S. 51 (1984).

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

WASHINGTON, D.C. 20530

File: A37 277 276 - Buffalo

In re: RAJINDER SINGH SACHDEV

IN DEPORTATION PROCEEDINGS APPEAL ON BEHALF OF RESPONDENT:

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ON BEHALF OF SERVICE:

Michael Rocco
General Attorney

CHARGE:

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(20), I&N Act [8 U.S.C. § 1182(a)(20)]—No valid immigrant visa

APPLICATION: Termination

This matter is before the Board on appeal from the immigration judge's decision of November 23, 1983, finding the respondent deportable as charged but granting his application for the privilege of voluntary departure in lieu of deportation. The appeal will be dismissed.[1]

The respondent is a 29-year-old native and citizen of India who was admitted to the United States for permanent residence on September 12, 1982, classified as the unmarried son of a lawful permanent resident under section 203(a)(2) of the Immi-

1 We note that the respondent, through counsel, requested to appear for oral argument but then failed to respond to our letter of January 30, 1985, tentatively scheduling a date for oral argument.

gration and Nationality Act, 8 U.S.C. § 1153(a)(2). However, the record reflects and the respondent admitted at the hearing (Tr. at 1-2) that he was married some two months earlier on Juiy 4, 1982. Therefore, the respondent's second preference immigrant visa was invalid, he clearly was inadmissible as an unmarried son, and accordingly he is deportable as charged. *Matter of Alarcon*, 17 I&N Dec. 574 (BIA 1980). The only remaining issue is the respondent's claim that the Government should be estopped from deporting him because of alleged "affirmative misconduct" by the consular officer when he obtained his visa.

The record contains the respondent's original visa application which reflects it was subscribed and sworn to by the respondent before the American vice consul in New Delhi on June 25, 1982. That application indicates in Block 30 that the respondent does *not speak* English but *can read* and write English. The record also contains an Optional Form (OF) 237 (formerly FS-546), "Statement of Marriageable Age Applicant," signed by the respondent and dated June 25, 1982. This form warns the respondent in English that he will lose his immigrant status if he marries before applying for admission to the United States. *See* 22 C.F.R. § 42.122(d). At the hearing, the respondent acknowledged his signatures on both the visa application and the OF-237. Tr. at 3. The respondent's actual immigrant visa also is contained in the record and was issued on that same date, June 25, 1982, by the vice consul. The respondent now claims he does not speak or read English and that the consular officer did not follow required procedures in issuing his visa—principally, that the officer did not properly warn and explain to him that he should not marry before entering the United States. Therefore, the respondent asserts the government must be estopped from deporting him, consistent with *Corniel-Rodriguez* v. *INS*, 532, F.2d 301 (2d Cir. 1976).

We find *Corniel-Rodriguez* to be distinguishable and otherwise inapplicable to this case. First, the respondent has

failed to adequately prove that the consular officer erred in his conduct of the visa issuing process. There is a legal presumption that the consular official performed his duty correctly. *Matter of Reimer*, 12 I&N Dec. 443, 444 (BIA 1967); *see Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 405 (1971). It is clear that the *only* evidence to show breach of duty by the consular officer is the respondent's own testimony. Contrary to his assertion on appeal, this is patently insufficient to overcome the presumption of regularity, a principle illustrated by *Corniel-Rodriguez* itself. There, the alien's testimonial claim was corroborated by identical testimony of another witness as well as by the fact that the Government was unable to produce the "Statement of Marriageable Age Applicant" which the alien was supposed to have been given and signed. Here, however, there is absolutely no evidence to support the respondent's testimony. The respondent presented no corroborating testimony or affidavits from other witnesses to the visa issuing process, the OF-237 does exist and admittedly contains the respondent's signature, and the visa and visa application bear no indication of any irregularity on their faces. We are unaware of any case law holding that the presumption of regularity is overcome on the bare, unsupported testimony of the person claiming error and we are unwilling to so hold. Accordingly, we conclude the respondent has failed to overcome that presumption and prove his allegation that the consular officer breached his duty in issuing the respondent's immigrant visa.

Other factors also distinguish this case from *Corniel-Rodriguez*. Unlike that case, the instant respondent does not and cannot claim that he never received the required warning about the consequences of marriage upon his immigrant status because he did acknowledge by his signature receipt of the OF-237. Nevertheless, the respondent asserts this warning was not meaningfully conveyed to him—*i.e.*, in a language which he could understand—either in writing in the OF-237 or orally by the consular officer. It is true that the OF-237 recites on its face that "when necessary," the consular officer "shall trans-

late the English text [contained thereon] into the local language in the following space." However, under the circumstances, the consular officer did not err by not so translating the warning into the respondent's primary language (Punjabi) because there was no apparent necessity to do so. As indicated earlier, the consular officer was informed by the respondent's answers on his visa application that the respondent *did read* English. Moreover, that the respondent apparently did not converse with the consular officer in English was not unusual inasmuch as the visa application also indicated the respondent did *not speak* English. Thus, the consular officer would have had no reason to believe that the respondent could not understand the written warning on the OF-237. That he assertedly can not actually read English does not undercut the apparent reasonableness of the consular officer in not translating the OF-237 into Punjabi. Rather, it was the respondent who acted unreasonably. The asserted fact that a family friend completed the visa application for the respondent does not relieve the respondent of responsibility for the accuracy of its contents. In addition, reasonably prudent persons do not sign their names to documents without understanding what it is they are signing. The respondent signed both the visa application and the OF-237, apparently making no inquiry or request of the consular officer for further explanation of its contents nor giving any indication that this was necessary. Under all these circumstances, the respondent has failed to demonstrate that the consular officer's actions were in any way improper.

Assuming *arguendo* that the Board has authority to even invoke estoppel against the Government, the consular officer's conduct here does not support application of the estoppel doctrine. The Supreme Court has left unanswered the question whether, in some circumstances, the Government may be estopped by the "affirmative misconduct" of its employees. *See INS* v. *Miranda*, 459 U.S. 14 (1982); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961). Whatever the resolution of that question, it is clear that no such "affirmative misconduct" exists under the circumstances of this case. For

example, in *Schweiker* v. *Hansen*, *supra*, a Government employee misadvised Hansen regarding certain eligibility requirements for social security benefits and breached his duty to encourage her to file a written application for benefits for which she was eligible; nevertheless, the Supreme Court concluded that such conduct fell "far short" of that which might require estoppel and did not amount to affirmative misconduct. We find that the action here of the consular officer also falls far short of that necessary to invoke estoppel and does not constitute "affirmative misconduct." We reach this same conclusion even if the consular officer's conduct in some regard might be faulted, as asserted by the respondent's unsubstantiated claim.[2]

In summary, we find that the respondent's deportability as charged is established by clear, unequivocal, and convincing evidence and we reject his estoppel defense.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ MARY MAGUIRE DUNN
Acting Chairman

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2 We otherwise note that this equitable relief should not be applied to accord the respondent a benefit for which he clearly was not eligible. As stated in *INS* v. *Miranda*, 459 U.S. 14, 16 (1982), it is "clear that neither the Government's conduct nor the harm to the respondent is sufficient to estop the Government from enforcing the conditions imposed by Congress for residency in this country." *See also Akbarin* v. *INS*, 669 F.2d 839, 844 (1st Cir. 1982); *Kwon* v. *INS*, 646 F.2d 909 (5th Cir. 1981); *Montilla* v. *United States*, 457 F.2d 978, 986-87 (Ct. Cl. 1972); *Matter of Polanco*, 14 I&N Dec. 483 (BIA 1973).

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

WASHINGTON, D.C. 20530

File: A37 277 276 - Buffalo

In re: RAJINDER SINGH SACHDEV

IN DEPORTATION PROCEEDINGS MOTION ON BEHALF OF RESPONDENT:

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New York, NY 10007

ON BEHALF OF SERVICE:

Michael Rocco
General Attorney

CHARGE:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)]—Excludable at entry under sec. 212(a)(20), I&N Act [8 U.S.C. § 1182(a)(20)]—No valid immigrant visa

APPLICATION: Reconsideration; Termination

ORDER:

PER CURIAM: The respondent, through new counsel, moves for reconsideration on three gounds of our decision of March 7, 1985, finding him deportable as charged. First is the argument that the respondent's personal admission at the hearing that he was married in India prior to immigrating to this country constitutes a "conclusion of law" which the respondent was incompetent to make; this contention is so vapid as to deserve no discussion. The respondent's original counsel (a person clearly learned in the law) also admitted on the respondent's behalf allegation five in the Order to Show Cause, *i.e.*,

that the respondent married on July 4, 1982 in India (Tr. at 1). An alien's attorney's admissions at his deportation hearing constitute substantial evidence of the facts so admitted. *Rodriguez-Gonzalez* v. *INS*, 640 F.2d 1139 (9th Cir. 1981). Moreover, having failed to raise this issue on direct appeal, the respondent waived it and may not properly now seek reconsideration of an issue never brought before us for initial consideration. Second, the respondent's attempt to recloak his former estoppel argument in the new guise of a due process claim will not be countenanced and is rejected. Third, the claim that "there are some questions to be resolved about the [authenticity of the respondent's] signature on the [Form] OF-237" is ludicrous because the respondent himself verified the authenticity of his signature on that form. Transcript at 3. The respondent has presented nothing to overcome the bases of our previous comprehensive decision and this motion appears designed solely for purposes of delay. Accordingly, the motion to reconsider is wholly without merit and is denied.

/s/ MARY MAGUIRE DUNNE
Mary Maguire Dunne
Acting Chairman

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1 We also note that, contrary to the assertion on page 3 of the respondent's motion brief, several documents which indicate the respondent was married in India were introduced at the hearing, having been accepted into evidence *without objection* by the respondent. Tr. at 1, 5.

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

WASHINGTON, D.C. 20530

July 26, 1985

File: A37 277 276 - Buffalo

In re: RAJINDER SINGH SACHDEV

IN DEPORTATION PROCEEDINGS MOTION ON BEHALF OF RESPONDENT:

Leo E. Ypsilanti, Esquire
291 Broadway, Suite 1200
New York, NY 10007

APPLICATION: Stay of Deportation

Counsel for the respondent has applied for a stay of deportation pending the Board's consideration of a motion to reopen. After consideration of all information, the Board has concluded that there is little likelihood that the motion to reopen, when received, will be granted. Therefore, the request for a stay of deportation is denied.

ORDER: The request for a stay of deportation is denied.

DAVID L. MILHOLLAN
Chairman

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 85-4112

SACHDEV

—v.—

INS

NOTICE OF MOTION—For Leave to refile out of date petition for rehearing timely filed on May 6, 1986

MOTION BY:

LEO E. YPSILANTI, P.C.
291 Broadway, New York, NY 10007
(212) 964-2055
LEO YPSILANTI, ESQ.

Has consent of opposing counsel:
A. been sought? x No
B. been obtained? x No

Has service been effected? x Yes

Is oral argument desired? x No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:
A. by scheduling order? x Yes
B. by firm date of argument notice? x Yes
C. If Yes, enter date: _____

OPPOSING COUNSEL:
U.S. ATTORNEY
Southern District of New York
One St. Andrews Plaza
Foley Square, NY 10007
JORGE GUTLEIN, ESQ.

EMERGENCY MOTIONS, MOTIONS FOR STAYS &
INJUNCTIONS PENDING APPEAL

Has request for relief been made below? x No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need
for this motion? x No

If No, explain why not:

Will the parties agree to maintain the
status quo until the motion is heard?

Judge or agency whose order is being appealed: N/A. This is a petition for rehearing of a decision which the Court rendered in a published opinion dated April 22, 1986.

Brief statement of the relief requested: Petitioner seeks to have his case re-heard *in banc* on the basis of an emended version of his original petition for rehearing which was filed on May 6, 1986, but which did not contain an *in banc* designation on the cover. If the untimeliness of the emended version is not waived, petitioner requests that rehearing be made on the basis of the petition in its original form as file on May 6, 1986.

By /s/ LEO E. YPSILANTI
Leo E. Ypsilanti
Attorney for Rajinder S. Sachdev

May 13, 1986

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

By /s/IRVING S. KAUFMAN

WHT/per IRK

RJC per IRK

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Filed: MAY 16, 1986
ELAINE B. GOLDSMITH, *Clerk*

Supreme Court, U.S.
FILED
SEP 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-117

In the Supreme Court of the United States

OCTOBER TERM, 1986

RAJINDER SINGH SACHDEV, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
ROBERT KENDALL, JR.
SUSAN L. KAMLET
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Immigration and Naturalization Service (INS) is precluded from deporting petitioner for entering the country with an invalid visa (issued to him as an unmarried son of a lawful permanent resident), on the ground that the INS did not notify him of the invalidity prior to his leaving his homeland, where petitioner had married prior to entering the United States and had failed to inform the INS of that fact.

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1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure* (rev. ed. 1986) 7

1 A. Fragomen, A. Del. Rey & S. Bernsen, *Immigration Law and Business* (1985) 7

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-117

RAJINDER SINGH SACHDEV, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 788 F.2d 912. The decisions of the Board of Immigration Appeals (BIA) dismissing petitioner's appeal (Pet. App. 6a-10a), denying his first motion for reconsideration (Pet. App. 11a-12a), and denying his application for a stay of deportation pending the BIA's adjudication of his second motion for reconsideration (Pet. App. 13a) are unreported. The BIA's decision denying petitioner's second motion for reconsideration (App., *infra*, 1a-3a), rendered on September 4, 1986, is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1986. The petition for a writ of certiorari was filed on July 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

1. Petitioner entered the United States on September 12, 1982, with an immigrant visa issued to him by the American Embassy in India. Petitioner's father had filed an immigrant visa petition on his behalf, and the Immigration and Naturalization Service (INS) had approved the petition based on petitioner's "second preference" status as the unmarried son of a lawful permanent resident of the United States.[1] On the basis of the approved petition, petitioner had applied for and received an immigrant visa. Pet. App. 2a.

On July 4, 1982, one week after submitting his visa application to the American Embassy, petitioner married. Without informing immigration officials of the change in his marital status, petitioner thereafter entered the United States. Pet. App. 2a-3a.

On June 7, 1983, petitioner filed an immigrant visa petition on behalf of his wife and his newborn son, seeking their admission to the United States. The petition listed the date of his marriage and thereby alerted INS officials to the fact that petitioner had married prior to entering the United States. Pet. App. 3a.

2. On July 3, 1983, the INS commenced deportation proceedings against petitioner, alleging that petitioner's marriage made him ineligible to enter the United States by

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[1] Unless otherwise exempt, aliens seeking to immigrate to the United States must obtain an immigrant visa under the preference scheme set forth by Congress in 8 U.S.C. 1153. Pursuant to 8 U.S.C. 1154, a lawful permanent resident may file a visa petition to classify his or her alien unmarried son or daughter as a "second preference" immigrant under 8 U.S.C. 1153(a)(2) (first preference being limited, under 8 U.S.C. 1153(a)(1), to unmarried children of American citizens).

means of a "second preference" visa.[2] At the deportation hearing, petitioner admitted the allegations relating to the time, place and manner of his entry into the United States, his citizenship and his marriage. Petitioner contended, however, that American consular officials had failed to inform him in his own language that marriage prior to entry into the United States would nullify his visa preference status, and that the government therefore should be estopped from deporting him. On November 23, 1983, the immigration judge found petitioner deportable. Pet. App. 3a-4a, 6a-10a.

On March 7, 1985, the BIA dismissed petitioner's appeal from the immigration judge's decision. Based on the evidentiary record, the BIA found that the consular officials had properly relied on petitioner's representations that he could read and write English when they presented to him for examination and signature a form (known as a Form OF-237) explaining that marriage prior to entry would invalidate the immigrant visa. Pet. App. 7a-10a.

Petitioner subsequently filed a motion for reconsideration with the BIA. In his motion, petitioner alleged that there was insufficient evidence to show that his marriage was bona fide, that his due process rights were violated by the consular officials' failure to translate the Form OF-237 into his native language, and that the authenticity of his signature on the Form OF-237 had not been established. The BIA denied petitioner's motion on June 20, 1985. Pet. App. 11a-12a.

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[2] Under 8 U.S.C. 1251(a)(1), deportation is authorized with respect to any alien who, at the time of his entry into the United States, was excludable under the law existing at the time of such entry. Petitioner was excludable under 8 U.S.C. 1182(a)(20), which provides for the exclusion of "any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by [the Immigration and Nationality Act] * * *."

Petitioner subsequently moved for reconsideration with the BIA and also moved for a stay of deportation pending the BIA's adjudication of that motion. In addition to reiterating his past contentions, petitioner raised, for the first time, the claim that he had received untimely notice of the revocation of his approved immigrant visa petition, in violation of 8 U.S.C. 1155.[3] On July 26, 1985, the BIA denied petitioner's application for a stay of deportation, noting that petitioner's motion had little likelihood of being granted. Pet. App. 13a. The BIA denied petitioner's second motion for reconsideration on September 4, 1986, ruling that Section 1155 did not prevent the exclusion or deportation of an alien who did not receive notification of the invalidity of his visa prior to leaving his homeland (App., *infra*, 1a-3a).[4]

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[3] 8 U.S.C. 1155 provides:

> The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under [8 U.S.C. 1154]. Such revocation shall be effective as of the date of approval of any such petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by [8 U.S.C. 1225 and 1226].

[4] Although the BIA had not yet ruled on petitioner's second motion to reconsider at the time the case was decided by the court of appeals, the government noted in its brief to that court (Gov't Br. 16 n.*) that, in light of the Board's denial of petitioner's application for a stay, there was little likelihood that the BIA would grant his second motion to reconsider. Cf. *Barefoot* v. *Estelle*, 463 U.S. 880, 888-892 (1983) (while court of appeals in death penalty case did not formally affirm the district court, its denial of the motion for a stay of execution was in substance a resolution on the merits).

3. After the denial of his motion for a stay, petitioner sought review in the court of appeals. On April 22, 1986, the court of appeals denied the petition for review. It rejected petitioner's contention that the INS was precluded from deporting him because of its failure to notify him of the revocation of his visa prior to his entry into the United States. In reaching its decision, the court relied upon the BIA's decision in *In re Alarcon*, 17 I. & N. Dec. 574 (1980), in which the BIA ruled that the notice provision of 8 U.S.C. 1155 was inapplicable once the alien actually sought admission into this country, and that a deportation proceeding provided a fair and adequate opportunity for the alien to rebut the charge that his visa was invalid. The court indicated that the BIA's interpretation of Section 1155 was entitled to substantial deference, particularly in the absence of contrary authority. Pet. App. 3a-4a. The court further observed that to forbid the INS from deporting an alien such as petitioner, who had received an immigrant visa based on his unmarried status and who subsequently entered the United States without informing the INS of his change in status, "would invite fraud by petitioners seeking similar preference status" (*id.* at 3a).[5]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

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[5] The court also rejected petitioner's claim – which is not renewed in this Court – that the INS was estopped from deporting him because of the consular officials' failure to notify him in his native language that marriage would nullify his visa preference status. It reasoned that the consular officials were justified in providing only an English language warning in reliance on petitioner's own assertions that he could read and write English. Pet. App. 4a-5a.

Relying on 8 U.S.C. 1155, petitioner asserts (Pet. 5, 7) that once an alien commences his journey to the United States, the INS may not later deport him on the ground that he entered the country with an invalid visa. Petitioner "concedes that his visa was revoked" prior to his departure from India (*id.* at 5),[6] but claims that the revocation never took effect because he was not notified prior to leaving his country (*ibid.*). That claim is without merit.

Petitioner notes (Pet. 5) that under 8 U.S.C. 1155, revocation of an alien's visa petition must be accompanied by notice to the alien before he commences his journey and that such revocation shall have no effect absent valid notice. What he fails to recognize, however, is that the same statutory provision also states that "[i]f notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by sections 1225 and 1226 [governing exclusion of aliens]." Thus, the statute makes clear that the government's failure to give notice to an alien prior to his departure for this country does not prohibit the government from later excluding or deporting him; it simply means that summary notification cannot be effectuated, but that the alien is instead entitled to have his case considered in accordance with the procedures governing exclusion or deportation. See generally 8 U.S.C. 1251(a)(1) (authorizing deportation of aliens who were excludable at the time of entry); *Landon* v. *Plasencia*,

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[6] Under 8 C.F.R. 205.1(a)(8), approval of a petition for a visa based on the beneficiary's status as a child of a lawful resident alien is automatically revoked if the beneficiary marries before leaving for the United States. Subsection (d) of that regulation provides that when it appears to the district director that approval of a petition has been automatically revoked, he shall notify the consular office having jurisdiction over the visa application and shall mail a copy of the notice to petitioner's last known address.

459 U.S. 21, 25-28 (1982) (discussing exclusion and deportation proceedings). Thus, the BIA's ruling that Section 1155 does not preclude deportation in the present case is in accordance with the plain meaning of the statute.[7]

Moreover, even if Section 1155 were ambiguous, the BIA's interpretation would nonetheless be correct. Under the BIA's interpretation, an alien who has withheld crucial information demonstrating his ineligibility for a visa can be excluded or deported so long as the INS follows the proper procedures. Under petitioner's interpretation, however, as the court of appeals recognized (Pet. App. 3a), an ineligible alien, such as petitioner, could obtain admission to this country by engaging in fraud or concealment, and the INS would be powerless to respond. Such a result could not possibly have been intended by Congress.

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[7] Apart from the decision in the present case, there appears to have been no published judicial decision specifically addressing the applicability of the notice requirement of 8 U.S.C. 1155 in exclusion or deportation proceedings to determine the validity of a visa pursuant to 8 U.S.C. 1182(a)(20). Two leading immigration treatises, however, have indicated that the government's failure to give notice under Section 1155 does not ensure the alien's lawful admission. See 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 3.5i, at 3-60.6 - 3-60.7 (rev. ed. 1986) (footnote omitted) (if notice not given under Section 1155, approval of the visa is not disturbed and "the beneficiary's admissibility is determined at the time he applies for admission to the United States"); 1 A. Fragomen, A. Del Rey & S. Bernsen, *Immigration Law and Business* § 3.7, at 3-117 (1985) (indicating that if notice under Section 1155 is not given prior to the alien's departure for the United States, his admissibility can be challenged in exclusion proceedings or the INS can attempt to deport him under 8 U.S.C. 1251(a)(1), which permits deportation of aliens excludable at the time of entry). Similarly, several courts have held that an alien who has been admitted to the United States in a procedurally regular fashion, but who has not complied with substantive legal requirements for admission, has not been "lawfully admitted" for permanent residence. See, *e.g.*, *Monet* v. *INS*, 791 F.2d 752, 753-754 (9th Cir. 1986); *In re Longstaff*, 716 F.2 1439, 1441 (5th Cir. 1983), cert. denied, 467 U.S. 1219 (1984).

See generally *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542-543 (1940) (same).

As the court of appeals recognized (Pet. App. 3a-4a), petitioner's deportation proceeding gave him a "fair and adequate opportunity to rebut the Service's allegations that his visa was invalid." And petitioner makes no claim that the deportation proceeding was somehow defective. Petitioner has therefore been given every right to which he was entitled, and the court of appeals properly denied his petition for review.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
ROBERT KENDALL, JR.
SUSAN L. KAMLET
Attorneys

SEPTEMBER 1986

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[8] Petitioner also claims (Pet. 6, 8) that the government's failure to notify him of the invalidity of his visa pursuant to Section 1155 deprived him of due process and estopped the INS from deporting him. Those claims are groundless. The reason he was not notified of the invalidity of his visa prior to departure for this country is that he had concealed from the INS his change in marital status.

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA 22041

File: A37 277 276 – Buffalo September 4, 1986

In re: RAJINDER SINGH SACHDEV

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Leo E. Ypsilanti, Esquire
291 Broadway, Suite 1200
New York, New York 10007

ON BEHALF OF SERVICE: Michael Rocco
General Attorney

CHARGE:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(20), I&N Act, 8 U.S.C. 1182(a)(20) – no valid immigrant visa

APPLICATION: Reconsideration; Termination

ORDER:

PER CURIAM. The respondent, again, moves for reconsideration of our decision of March 7, 1985, finding him deportable as charged. On June 20, 1985, we denied the respondent's initial motion to reconsider. We again deny the motion because we conclude that the new motion contains only a reiteration of the same arguments rejected

by this Board on June 20, 1985, and by the U.S. Court of Appeals for the Second Circuit in *Sachdev* v. *INS*, 788 F.2d 912 (2d Cir. 1986).

We again conclude that the record contains clear, convincing, and unequivocal evidence of the respondent's deportability under section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), as required by *Woodby* v. *INS*, 385 U.S. 276 (1966), and 8 C.F.R. 242.14(a). The respondent freely admitted under oath that he had married two months prior to his admission into the United States as the unmarried son of a lawful permanent resident of the United States (Tr. at 2). Counsel for the respondent specifically admitted this marriage prior to the respondent's admission (Tr. at 1). The respondent's continued reference to our decision in *Matter of Salazar,* 17 I&N Dec. 167 (BIA 1979), is unconvincing. This is not a case involving section 205 of the Act, 8 U.S.C. § 1155, like *Salazar* in which the visa petition was withdrawn by the petitioner but the respondent had no actual notice of the withdrawal prior to his admission into the United States.[1] Rather, this respondent was deportable as charged because he was married prior to his admission, not because his visa was revoked. *Matter of Alarcon,* 17 I&N Dec. 574 (BIA 1980). Thus, he no longer was the unmarried son of a lawful permanent resident of the United States when he entered the United States as a second

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[1] Where the Service is aware that a visa petition has been withdrawn, the Act requires notice of the automatic revocation of the approval of the visa petition to the beneficiary. *See* section 205 of the Act, 8 U.S.C. § 1155; *Matter of Salazar, supra.* However, when the visa has been revoked because the alien has married, such revocation is not the determinative factor regarding deportability. The determinative factor is that the respondent is now married, and has actual notice of the fact that he is no longer unmarried.

preference immigrant. He was aware of the fact that he was married, and had been given notice that if he married he would no longer qualify for second preference immigrant status. The record contains the Statement of Marriageable Age Applicant (OF 237) (Group Exh. 2) giving him notice that he would lose his second preference status if he married before immigrating into the United States. *Matter of Agustin* 17 I&N Dec. 14 (BIA 1979); *Matter of Wang,* 16 I&N Dec. 87 (BIA 1977). The respondent had indicated in his visa application (Form 230, #30) that he was able to read and write English, as the court noted. 788 F.2d at 914.

/s/ MARY M. DUNNE
Acting Chairman

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